IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH MAIO, et al.	:	CIVIL ACTION
v.	:	
AETNA INC., et al.	:	NO. 99-1969

MEMORANDUM AND ORDER

FULLAM, Sr.J. SEPTEMBER , 1999

In this civil RICO action with pendent state law claims, plaintiffs represent a putative class of persons who are or were enrolled in defendants' HMO plans at any time from July 19, 1996 to the present. In a nutshell, plaintiffs allege that "defendants engaged in a nationwide fraudulent scheme designed to induce individuals to enroll in Aetna's HMO Plan by representing that Aetna's primary commitment, in connection with the healthcare services provided to its HMO members, is to maintain and improve the quality of care given to such members ... [whereas] Aetna's commitment ... was, and is, primarily driven by fiscal and administrative considerations." Complaint at ¶2. Various configurations of defendants have filed motions to dismiss accompanied by voluminous appendices; I may consider these materials because the plaintiffs made reference to and relied upon these documents in the complaint, even though they did not append them thereto. *See* In re Burlington Coat Factory Sec. Litig, 114 F.3d

1410, 1426 (3d Cir. 1997).

To state an action pursuant to the civil liability provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964, a plaintiff must plead the conduct of an "enterprise" through a pattern of racketeering activity, as well as injury to the plaintiff, his business or his property. Plaintiffs have alleged the existence of two enterprises. The first is Aetna, Inc. in association with Aetna-U.S. Healthcare and the various Aetna plans. The second is an association-in-fact of the Aetna entities with the various physicians and Individual Practice Associations (IPAs) associated with the plans. Defendants allegedly conspired to and did profit from these activities, and used and invested these profits in the operation of the enterprise in violation of 18 U.S.C. §1962(a) and (c). Plaintiffs claim to have been injured thereby, in that the HMO plans they actually received were worth less than what they paid for them.

The motions to dismiss raise similar issues. First, defendants assert that plaintiffs lack standing because while plaintiffs claim that because of defendants' actions quality of care will suffer and/or their HMO plans are worth less than they cost, no one claims to have been injured by being denied necessary care. Indeed, plaintiffs have explicitly disclaimed any injury due to the denial of benefits, reduction of benefits, inferior care, malpractice, negligence and breach of contract. Complaint at ¶45. Therefore, say defendants, any injury to plaintiffs is purely hypothetical and at best indirect. Second, defendants say that there can be no fraud where the policies and contract provisions at issue (relating to how physicians are compensated, how certain terms are defined, etc.) were fully disclosed, and that statements concerning defendants' commitment to quality health care are "mere puffery." Third, defendants assert that plaintiffs

have pled neither a valid RICO enterprises nor any injury resulting from the investment or use of alleged racketeering income. Finally, defendants argue that plaintiffs' RICO claims interfere in state regulation of the insurance industry in violation of the McCarran-Ferguson Act, that the Employees Retirement Income Security Act (ERISA) preempts any claims relating to HMOs that are ERISA plans, and that Federal Employees Health Benefits Act (FEHBA) and the Medicare Act preempt any claims by beneficiaries covered by these laws. I conclude, for the reasons that follow, that plaintiffs' RICO claims must fail, and will decline to exercise supplemental jurisdiction over plaintiffs' remaining claims, if any.

In order to invoke federal jurisdiction, a plaintiff bears the burden of showing standing by establishing three elements: First, the plaintiff must have suffered an "'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) 'actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)(citations omitted). Second, plaintiff must demonstrate that there is "a causal connection between the injury and the conduct complained of." *Id.* Finally, it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision by the court. *Id*. at 561. Plaintiffs claim to have been injured in that they were fraudulently induced to enroll in the defendant HMOs as a result of Aetna's representation that it is primarily concerned with quality of care. Because defendants are allegedly more interested in profits and cost containment, plaintiffs contend that they have paid more for their HMO plans than those plans are worth. As noted above, however, plaintiffs disclaim any injury due to the denial of benefits, reduction of benefits, inferior care, malpractice, negligence and breach of contract-- in short, plaintiffs have disclaimed any injury that has the potential to decrease the value of defendants'

plans. The HMOs simply cannot be "worth less" unless something plaintiffs were promised was denied them. A vague allegation that "quality of care" may suffer in the future is too hypothetical an injury to confer standing upon plaintiffs, and in addition, would require this court to assume that in every case, individual physicians and IPAs will be moved to put their own economic interests ahead of their patients' welfare. Even if this were the inevitable result, defendants would not be the proximate cause of the providers' ethical lapses. *See* Weiss v. CIGNA Healthcare, Inc., 972 F. Supp. 748, 752 (S.D.N.Y. 1997).

My conclusion that plaintiffs lack standing to maintain this action makes it unnecessary to address defendants' remaining arguments. Assuming for the sake of argument that standing has been satisfactorily established, however, the complaint suffers from other fatal defects. First, as a matter of law, it is highly doubtful that advertising one's commitment to "quality of care" can serve as the predicate for a fraud claim. Such general assertions as to quality are puffery, and do not constitute a fraudulent inducement to membership in defendants' HMO plans, particularly where the complained-of cost containment provisions are disclosed to prospective members.

Second, I agree with defendants that plaintiffs have not pled a proper RICO "enterprise." An enterprise which consists of an association-in-fact of Aetna with its various plans -- i.e. a parent and its subsidiary corporations -- cannot be a valid RICO enterprise where the defendants are not distinct from the enterprise. *See* Metcalf v. PaineWebber Inc., 886 F. Supp. 503, 513-14 (W.D. Pa. 1995), *aff'd,* 79 F.3d 1138 (3d Cir. 1996). Plaintiffs' second purported enterprise consists of a series of associations-in-fact of Aetna and its subsidiaries with the various doctors and IPAs associated with the plans. Plaintiffs have not alleged that the

providers share any common purpose whatsoever with defendants, instead citing numerous instances where the two groups are at odds. Finally, it is worth noting that plaintiffs' expression of dissatisfaction with defendants' plans -- indeed, with HMOs in general -- is more appropriately directed to the legislatures and regulatory bodies of the several states.

One matter remains which requires brief discussion. Defendants have moved for Rule 11 sanctions and for the disqualification of plaintiffs' co-counsel, the New York law firm of Milberg, Weiss, Bershad, Hynes & Lerach LLP. The basis for both motions is the fact that Milberg, Weiss offers an Aetna HMO plan to its employees. Therefore, according to defendants, at the time the complaint was filed the firm was actually in possession of all the documents and information that plaintiffs claim were concealed; moreover, defendants assert there is a conflict of interest between the law firm and the members of the purported class. These motions will be denied. With regard to the issue of sanctions, the fact that the parties disagree about the sufficiency of the allegations contained in the complaint does not give rise to a Rule 11 violation. And as for the motion to disqualify counsel, I note that the adequacy of class counsel is an issue to be determined at the time of class certification. Even assuming that the possibility that some Milberg, Weiss attorneys may be class members is sufficient to disqualify the firm from acting as co-counsel, there is at present no "class," and therefore defendants' motion is, at best, premature.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH MAIO, et al.	:	CIVIL ACTION
v.	:	
AETNA INC., et al.	:	NO. 99-1969

O R D E R

AND NOW, this day of September, 1999, IT IS ORDERED:

1. Defendants' motions to dismiss are GRANTED IN PART.

2. Plaintiffs' claims pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO) are DISMISSED WITH PREJUDICE.

3. Plaintiffs' remaining claims are DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

4. Defendants' motions for disqualification of counsel and for sanctions are DENIED.

5. All other pending motions are DISMISSED AS MOOT.

_____
Fullam, Sr.J.